

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

S&F MARKET STREET HEALTHCARE LLC
d/b/a WINDSOR CONVALESCENT CENTER
OF NORTH LONG BEACH

and

Case 21-CA-36422

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 434B, AFL-CIO

and

Case 21-CA-36645

ANNIE MOSS, An Individual

and

Case 21-CA-36650

TARA SMITH, An Individual

Alan L. Wu and Jean Libby, Attys., Counsel for the General Counsel,
Region 21, Los Angeles, California.
Laurence R. Arnold, Joshua M. Sable, and Scott P. Inciardi, Attys.,
Counsel for Respondent, Foley & Lardner LLP,
San Francisco, California,
Dana S. Martinez and Elizabeth Garfield, Attys., Counsel for Charging Party,
Holguin and Garfield, Los Angeles, California.

DECISION

Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Los Angeles, California on September 14 through 16, October 19 through 21, and November 7 and 8, 2005¹ upon Amended Consolidated Complaint and Amended Notice of Hearing (the Complaint) issued August 11, 2005 by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by Service Employees International Union, Local 434B, AFL-CIO (the Union or the Charging Party), by Annie Moss, an individual, and by Tara Smith, an individual. The Amended Consolidated Complaint, alleges S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach (Respondent) violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

¹ All dates herein are 2004 unless otherwise specified.

Issues

1. Was Respondent a successor to Covenant Care Orange, Inc., d/b/a Candlewood Care Center on and after July 1?
2. Did Respondent violate Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning the terms and conditions of employment of employees in appropriate units represented by the Union?
3. Did Respondent violate Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to the terms and conditions of employment of employees employed in appropriate units represented by the Union without prior notice to the Union and without affording the Union an opportunity to bargain regarding the changes.
4. Did Respondent violate Section 8(a)(3) and (1) of the Act on and after June 30 by refusing to hire Edna Colter, Debra Smith, Sharie Hailey, and Annie Moss?
5. Did Respondent violate Section 8(a)(3) and (1) of the Act on July 7 by suspending employees Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith?
6. Did Respondent violate Section 8(a)(3) and (1) of the Act on July 23 by terminating employees Tracy Davenport, Nana Williams, Nereida Jimenez, and Gladys Matos?
7. Did Respondent violate Section 8(a)(3) and (1) of the Act on August 10 by terminating employee Tara Smith?
8. Did Respondent engage in the following independent violations of Section 8(a)(1) of the Act: inform employees there was no union at its facility or that the facility was not a union facility and promulgate and maintain a rule requiring employees not to remain in the facility parking lot to talk to each other at the end of their shifts.

On the entire record,² including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a California corporation, doing business as Windsor Convalescent Center of North Long Beach has, at all relevant times, been engaged in the operation of a skilled nursing facility located on Market Street in Long Beach, California (the North Long Beach facility). During the 12-month period commencing July 1, Respondent derived gross revenues in excess of \$100,000 and purchased and received at the North Long Beach facility goods valued in excess of \$5,000, which originated from points located outside the state of California. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.³

² Counsel for the General Counsel's motion, joined in by the Charging Party, to strike the documents attached to Respondent's post-hearing brief that were not admitted into evidence during the hearing, is granted. Respondent's motion to strike Counsel for the General Counsel's references in his post-hearing brief to rejected exhibit GC 104 is granted. The General Counsel's motion to correct the transcript at 203:16 from "employees" to employers" is granted.

³ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

II. Alleged Violations of 8(a)(5)

A. Successorship Issue and Refusal to Bargain

5 SnF Management, Inc. (SnF Management) operates skilled nursing facilities (SNFs) in California under the name “Windsor.”⁴ Pursuant to its overall business plan, SnF Management seeks to attract so-called high acuity patients to its SNFs who qualify for Medicare reimbursement rates. For Respondent’s purposes, the optimal SNF residents are post-acute
10 care patients who need a SNF level of care, including rehabilitative services, for four to six weeks after hospitalization.

15 Prior to July 1, Covenant Care Orange, Inc. (Covenant Care) operated the North Long Beach facility under the business name, Candlewood Care Center (Candlewood). Covenant Care was signatory to separate collective-bargaining agreements with the Union. The agreements had respective terms of August 31, 2001 through August 1, 2003 and May 1, 2002 through August 1, 2004 and covered, respectively, the following units (the Base unit and the LVN unit):⁵

The Base Unit⁶

20 All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed at the nursing facility.

The LVN Unit

25 All full-time and regular part-time Licensed Vocational Nurses (LVNs) employed at the nursing facility.

30 Tracy Davenport (Ms. Davenport), Gladys Matos (Ms. Matos), Edna Colter (Ms. Colter), Sharie Hailey (Ms. Hailey), Annie Moss (Ms. Moss), Nana Williams, and Debra Smith served as union stewards at Candlewood.⁷

35 ⁴ In addition to Respondent, SnF Management has SNFs in San Diego, National City, Anaheim, Hawthorne, Los Angeles, Van Nuys, North Hollywood, and another in Long Beach (Windsor Gardens of Long Beach).

⁵ Negotiations following the expiration of the Base unit agreement continued until the sale of the nursing facility.

⁶ Respondent refers to this unit as the “Service Unit.”

40 ⁷ Although Respondent denies knowing, prior to its takeover of the facility on July 1, which employees were union stewards, I cannot accept that assertion. Respondent offered supervisory employment to several Candlewood supervisors, including Candlewood administrator, Carmen Hernandez. It is reasonable to assume Respondent did so prior to July 1 and to assume that Respondent worked with Ms. Hernandez in organizing the takeover. Decisions relating to the takeover included whether or not to recognize the Union, and it is
45 reasonable to infer that Ms. Hernandez communicated union-related information to Respondent. Logically, the identity of union stewards would have been pertinent information. Moreover, a list of problem employees prepared by Ms. Hernandez in June distinguished the names “Davenport,” “Hailey,” “Moss,” and “Debra Smith” with heavy, adjacent black dots, and the name of “Moss” bore the additional notation, “steward.” It is reasonable to infer that the dots signified
50 the employees’ union stewardship in the Candlewood bargaining units. I find that Respondent knew that Ms. Colter, Ms. Smith, Ms. Hailey, and Ms. Moss were union stewards prior to July 1.

By early 2004, SnF Management was considering acquiring the North Long Beach facility. In February, SnF Management reviewed a property condition report on the facility prepared by Eckland Consultants Inc. The report cited numerous maintenance problems including damaged pavement, peeling paint, inappropriate roof storage, poor water drainage, decayed window frames, deteriorated flooring and screening, moribund air conditioning, and clogged plumbing. The report estimated improvement and repair costs at \$187,500. Respondent reviewed revenue calculations for the North Long Beach facility, which showed the facility, as operated by Candlewood, primarily accommodated low acuity patients with commensurately low reimbursement rates unlike Respondent's overall SnF Management plan, which was to attract high reimbursement rate patients. In the ensuing months, several representatives of Respondent toured the North Long Beach facility.

Respondent called a number of witnesses to testify regarding the conditions at the North Long Beach facility prior to July 1. The testimony of all Respondent's witnesses need not be fully recounted. Those of Ken Barry Dyches (Mr. Dyches), Vice President of Risk Management and Corporate Compliance with SnF Management, and Kathleen Leonard (Ms. Leonard), Respondent's director of human resources, are generally illustrative of the evidence Respondent offered on this issue. Mr. Dyches toured the North Long Beach facility during the early weeks of June. He testified that he observed filthy and neglectful conditions in the facility, e.g., residents drinking liquor they had purchased from the corner liquor store, unkempt residents, insufficient supplies of bed linen, deteriorating mattresses, unexplained bruising on residents, and pigeons, cockroaches, and rodents in the building. Ms. Leonard visited the North Long Beach facility on several occasions between April and July. She testified she observed the facility to be dark, dingy, noisy, and noisome, saw evidence of pigeons inside the building, dead cockroaches, insects, and rodent droppings, saw cleaning equipment and carts crowding the hallways, noticed inadequate cleaning and sanitation procedures, observed staff inattention to patients, and found the medical patients to be inactive, bored, and untidy and the mental patients to be agitated or restless. In Respondent's opinion, the conditions it observed at the North Long Beach facility evidenced an indifference by Candlewood staff toward maintaining a quality work environment, as "no [employees] would allow themselves to work in a building that was in [such a poor] condition." Accordingly, Ms. Leonard recommended to upper management that Respondent replace all the staff at the North Long Beach facility, take measures to provide an appropriate level of care for its residents, and completely overhaul the facility.

The General Counsel, on the other hand, proffered contrary evidence from former Candlewood employees to the following effect: the facility was well maintained with only rare and isolated incidents involving pigeons or vermin, which were immediately and effectively addressed by Candlewood management and staff; the facility's odor, while intermittently and inescapably reflecting the bodily functions of incontinent patients, generally manifested only the antiseptic smell normally associated with nursing facilities; the nursing staff were attentive to

patients and hygienic and professional in practice and demeanor; Candlewood regularly provided the residents with mental and sensory stimulation, as well as physical and social activities, including monthly candlelight dinners where nonalcoholic sparkling cider was served.⁸

Respondent found it was unable to eliminate the entire Candlewood staff prior to takeover, as replacement employees were not immediately available. Respondent determined, however, to weed out those Candlewood employees it deemed least suitable for employment. Ms. Leonard directed Carol Spencer (Ms. Spencer), director of staff development, to obtain assessments from Carmen Hernandez (Ms. Hernandez), Candlewood administrator, as to which employees had objectionable work records and to conduct her own review of Candlewood employee files with the purpose of identifying Candlewood employees to whom Respondent would not offer employment. Further, Respondent determined that after eliminating unacceptable applicants, it would offer only temporary employment for up to a 90-day period to the remainder of the Candlewood staff.

In preparation for its assumption of the Candlewood business, Respondent actively recruited employees for the North Long Beach facility from staff at its other facilities and from the general population. Respondent also provided job applications to the existing Candlewood staff, and Ms. Leonard, Ms. Spencer, and Carren Chastek (Ms. Chastek), Respondent's regional director of clinical services, conducted brief job interviews with interested employees.

There is no evidence Respondent's interviewers mentioned the Union in any job interview. There is conflicting evidence as to whether Respondent told the Candlewood job seekers that the employment offered was temporary. Ms. Leonard, Ms. Chastek, and Ms. Spencer testified they told employees that any employment offered would be temporary for up to 90 days. When employees asked what was meant by "temporary," Ms. Leonard told them Respondent would look at their work and assess them. Respondent did not tell any former Candlewood employee that its goal was to replace them within 90 days.

Former Candlewood employees testifying for Respondent either corroborated Ms. Leonard, Ms. Chastek, and Ms. Spencer's testimony or recalled, essentially, that Respondent's interviewers said employees would be reviewed for 90 days or would be on a 90-day probation, during which period Respondent would notify them whether they had "passed" the review. Former Candlewood employees testifying for the General Counsel generally denied that Respondent's interviewers said employment would be temporary. I do not specifically credit the accounts of one set of witnesses over the other. Rather, the record supports a finding that while Ms. Leonard, Ms. Spencer, and Ms. Chastek told applicants their employment would be temporary for up to 90 days, they also conveyed the clear understanding that Respondent was hiring them as "temporary" employees in order to assess their skills and abilities and that Respondent would review their work during the 90-day period and offer regular employment to those who passed the review.

⁸ The Charging Party sought to introduce a multipage report on Southern California Windsor facilities' regulatory compliance, entitled "Crisis of Care" prepared by Ari Yampolski, researcher for the Union, which addressed asserted patient care deficiencies in Windsor facilities. The purpose of the proffered evidence was to show that Respondent, being itself remiss in patient care quality, must have been disingenuous in criticizing Candlewood's standards or in deciding not to hire certain employees because of past work performance issues. As the report is not clearly probative of the issues before me, I declined to receive it.

Following the interviews, Ms. Leonard offered employment to 94 Candlewood employees and managers. Respondent mailed or hand-delivered offers of employment dated June 30, 2004 to Candlewood employees, which read, in pertinent part, as follows:

5 SUBJECT: OFFER OF TEMPORARY EMPLOYMENT

...

10 Congratulations! We are pleased to offer you temporary employment with Windsor Gardens-North Long Beach ("Windsor") for a period of up to 90 days...we look forward to the contributions you will make during your temporary employment.

...

15 Because Windsor will not have purchased or taken over the operations of the facility currently known as Candlewood until July 1st, we have been unable to assess your skills and abilities, as well as the building's ongoing operational and staffing needs. It is for this reason that your offer of employment is temporary in nature. No later than the expiration of the 90-day period, which ends on September 29th, your employment with Windsor will end, unless you are selected for regular employment. We will select our workforce from among the most qualified candidates, whether from Candlewood or elsewhere. If you express a
20 continued interest in employment during this 90-day period, you will be notified if selected for regular employment.⁹

25 SnF Management assumed ownership and management of the North Long Beach facility on July 1. Respondent was aware the Union had represented the Candlewood employees at the facility and had been signatory to collective bargaining agreements with Covenant Care. By letter dated June 29, Mr. Hirst had advised Respondent that the Union was the recognized representative of the Candlewood workers and requested a meeting to discuss the terms of the collective bargaining agreements covering those workers. By letter dated
30 July 1, Mr. Hirst notified Respondent that the Union represented a majority of the Candlewood employees and again requested a meeting.

35 Upon its July 1 takeover of the North Long Beach facility, Respondent employed approximately 120 individuals there, over 75 percent of whom had been Candlewood employees. Ten to 12 employees were non-Candlewood recruits, whom Respondent considered probationary or regular employees.

40 Respondent issued employee handbooks to both temporary and probationary employees. Respondent included an employee handbook in each probationary employee's employment packet. Respondent distributed employee handbooks to the temporary employees at an employee meeting held July 9. Both handbooks contained Respondent's terms and conditions of employment for employees in the classifications covered by the Base and LVN units. Both handbooks contained the following language:

45

50 ⁹ It is unnecessary to determine whether all hirees received the letter; the record as a whole supports a finding that Respondent informed all former Candlewood employees that it would review their work performance over a 90-day period, during which Respondent would select qualified employees for regular status and that Respondent termed the 90-day period as "temporary" employment.

EMPLOYEE STATUS AND COMPENSATIONA. INTRODUCTORY PERIOD

All new and rehired employees work on an introductory basis for the first ninety- (90) calendar days after their date of hire. The introductory period is intended to give new employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets their expectations. The Company uses this period to do an initial evaluation of employee capabilities, work habits and overall performance...

....

Upon satisfactory completion of the introductory period, employees enter one of the "regular" employment classifications.

....

Regular Employee

Employees who have completed their introductory period of employment...

....

Temporary Employee

Temporary employees are those who are hired on an interim basis to temporarily supplement the work force or to assist in the completion of a specific project.

Employment assignments in this category are of a limited duration. Employment beyond any initially stated period does not in any way imply a change in employment status. Temporary employees retain that status unless and until notified of a change by the Office Manager. Temporary employees are ineligible for any of the Company benefit programs, except those mandated by law.

The employee handbooks given to probationary employees differed from the handbooks given to temporary employees in that the former listed ten categories of employee benefits, including vacation pay, holiday pay, sick pay, group health and dental insurance, and employee education reimbursement,¹⁰ whereas the latter listed only five categories, all of which were mandated by law: workers compensation, state disability insurance, unemployment insurance, social security, and paid family leave.

By letter dated July 7, Respondent's attorneys replied to the Union's earlier requests for bargaining, stating, in pertinent part:

While we understand that your labor organization was the recognized representative of certain employees of the previous owner/employer, it is premature for your organization to claim representation rights for any of our employees at that location. Whether or not you can rightfully and lawfully claim representation rights as to any group of such employees will depend upon a determination that can only be made once we have a representative complement of regular employees. That has not yet occurred. Accordingly, we reject your request for recognition, and each of your other requests and demands at this time.

During the 90-days following July 1, Respondent's supervisors at the North Long Beach facility observed both probationary and temporary employees' work and decided to retain certain former Candlewood employees based on work performance, how they handled their

¹⁰ Probationary employees did not, however, become eligible for these benefits until after completion of their 90-day probationary period.

jobs, attendance, and skill level “just like every other employee.”¹¹ During the 90-day period, Respondent notified various temporary employees that Respondent had selected them for regular employment. On Aug 10, for example, Ms. Leonard offered ten temporary employees regular jobs. Respondent also listed the names of Candlewood employees who had been offered and accepted regular employment in its weekly newsletters to staff. As of October 1, Respondent had “transitioned” 30-40 temporary employees to regular status.¹²

Upon their transition into regular employment, Respondent gave the temporary employees the same handbooks probationary employees received. Temporary employees who attained regular status did not have to commence a 90-day probationary period but, like probationary employees, became permanent employees upon completion of 90 days’ employment. Both former Candlewood and non-Candlewood employees, were eligible for benefits after completion of 90 days employment.

In the weeks following its takeover of the North Long Beach facility, SnF Management replaced the facility’s air conditioning systems, repaired sewage lines, repainted resident rooms, wallpapered hallways, rebuilt nursing stations, redid the dining room, purchased shower chairs, and replaced about 70 resident mattresses, expending between \$450,000 and \$500,000 on the repairs/improvements.

As part of its defense to the 8(a)(5) allegations herein, Respondent sought to present evidence that the alleged predecessor’s bargaining units were inappropriate as all LVNs, under Respondent’s management policies, possessed supervisory authority as specified in Section 2(11) of the Act; therefore, the bargaining unit composition under Respondent had so altered as to obviate its successorship to Candlewood. All issues regarding appropriateness of the above-described units, including the supervisory status of LVNs, were resolved by Decision and Direction of election in 28-RC-6030 (formerly 21-RC-20417) issued March 22, 2002, resulting in Certification of Representative on April 25, 2002. The Board refuses to allow relitigation of unit appropriateness where a predecessor employer, in whose shoes the successor employer stands, has or could have litigated that issue. See *Hotel Del Coronado*, 345 NLRB No. 24, slip op. 2 and cases cited therein. Accordingly, I have rejected Respondent’s offer of proof as to the supervisory status of its LVNs.

B. Respondent’s Position Regarding Union Representation of Its Employees

On July 1, Tyrone Freeman (Mr. Freeman), general president of the Union, and Mr. Hirst visited the North Long Beach facility while an employer-sponsored employee barbeque was in process. In a contentious confrontation, Ms. Leonard told them to leave. According to Ms. Leonard, she told the two representatives that Windsor had purchased the operations and the employees were now Windsor employees. Mr. Hirst testified that, in the presence of employees, Ms. Leonard said there was no union in the facility. According to employee Tara

¹¹ Ms. Leonard admitted she testified to this effect at her pre-trial deposition. I do not credit Ms. Leonard’s denial at trial that employee performance was a consideration in retention of former Candlewood employees.

¹² The parties dispute whether former, unionized Candlewood employees formed a majority of the employees in the Base unit at the expiration of the 90-day period. Given my conclusions hereafter, I do not find it necessary to resolve this disagreement.

Smith, Ms. Leonard said the facility was not a union building and the union was not welcome there. I credit Mr. Hirst and Tara Smith accounts. They testified forthrightly, and their recollections are consistent with Ms. Leonard's later admitted statements.

5 During July, various union members and representatives passed out fliers at the North Long Beach facility in an effort to generate support for the Union. During that same month, Respondent posted and distributed anti-union flyers to its employees that addressed such topics as the mercenary motives behind the Union's efforts to represent employees at the North Long Beach facility, what a union could and could not do, the 10 Union's empty claims, and how the Union spends members' dues. On July 23, at a staff meeting of about 40 employees, Ms. Leonard told employees that, like other Windsor facilities, the North Long Beach facility was union-free.

15 Antoinette Harris (Ms. Harris), activity director for both Candlewood and Respondent respectively during relevant times, testified that in management meetings she attended, Ms. Leonard, Ms. Spencer, and Mr. Dyches repeatedly asked the managers to keep them informed of employee interest in the Union and to try to discourage employees from seeking union representation. Respondent urges that Ms. Harris' testimony be discredited, pointing out the implausibility of testimony to the effect that Respondent's managers repeated anti-union 20 cautions at every single management meeting. While exaggeration unquestionably detracts from credibility, I am unwilling to conclude that Ms. Harris entirely fabricated the statements. It is inherently probable, particularly after the union representatives' acrimonious visit to the facility, that some mention of the Union occurred in management meetings, and I observed Ms. Harris to be direct and clear in her testimony, if hyperbolic. I find, therefore, that 25 Respondent instructed its supervisors to watch for and to discourage union activity. The complaint does not allege that Respondent's instructions violate the Act, and there is no evidence Respondent intended for any supervisor to effect its directives in an unlawful manner.¹³ However, Ms. Harris' testimony, as well as Respondent's statements that the facility was nonunion and its dissemination of anti-union fliers, establish that Respondent strongly and 30 actively preferred not to have union representation of its employees at the North Long Beach facility.

III. Alleged Violations of 8(a)(3)

35 A. Respondent's Refusal to Hire Edna Colter, Debra Smith, Sharie Hailey, and Annie Moss

40 As noted above, Ms. Spencer obtained from Ms. Hernandez a list of 22 employees with allegedly problematic work records (Hernandez list). The list included the names of Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss. Ms. Spencer also reviewed Candlewood employees' files in about the third week of June with the object of identifying misconduct and disciplinary issues. Ms. Spencer pinpointed 26 employees, including Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss, whose employee records assertedly revealed undesirable past work 45 performance and/or misconduct and prepared a summary of the 26 names and findings (Spencer list). Thereafter, and prior to July 1, Ms. Spencer furnished both the Hernandez and the Spencer lists to Ms. Leonard. The Spencer list showed the following notations for the following alleged discriminates:

50 ¹³ Watching for union activity does not automatically denote unlawful surveillance and discouraging it may be lawfully accomplished by attentiveness to employee concerns.

Edna Colter -- Insubordination 03
Insubordination 4/04

Debra Smith -- Poor attendance
5 in 4 months for '04
Since 2002 started
Med error – not giving meds to Res.

Sharie Hailey -- Insubordination/confrontation
Attendance—poor 7x's '04

Annie Moss -- Creating hostile work environment [with] other
[licensed nurses]¹⁴

Because response to its employment advertising was less enthusiastic than anticipated, Respondent revised its estimate of how many Candlewood employees it could initially reject for employment. Respondent hired almost half the employees named on the Hernandez and Spencer lists despite their past work records because of Respondent's staffing needs.¹⁵ Respondent declined to hire Ms. Colter, Ms. Smith, Ms. Hailey, and Ms. Moss. In early July, Respondent sent letters to rejected Candlewood employees stating, in pertinent part:

Thank you for expressing interest in a position with Windsor Gardens-North Long Beach ...Unfortunately, based upon a review of your qualifications & other documentation available to us, we are not in a position to offer you employment at this time.

B. Respondent's July 7 Suspensions of Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith

On July 7, Ms. Spencer found employee Shrona Williams cowering in an empty patient's room. Shrona Williams told Ms. Spencer she was frightened because a group of employees was threatening her and pressuring her to do something she did not want to do. Ms. Spencer reported the matter to Ms. Leonard, who requested information in writing from Shrona Williams. Shrona Williams gave a brief, handwritten statement to Ms. Spencer, which she turned over to Ms. Leonard. In pertinent part, the statement reads:

¹⁴ The summary Respondent introduced into evidence listed twenty-six names with attendant notations. Counsel for the General Counsel produced another document, retrieved from files subpoenaed from Respondent, which did not list the names Debra Smith, Sharie Hailey, and Annie Moss. Ms. Spencer and Ms. Leonard both testified the summary produced by Counsel for the General Counsel was an incomplete list, created before all employee files had been reviewed. I credit Ms. Spencer and Ms. Leonard's testimony in this regard, as their recollections were clear and detailed. Although Respondent could not produce documentary evidence to corroborate all the information on the Spencer list, I note the underlying records were not in Respondent's possession or control at all relevant times. Therefore, I find the lack of corroborative evidence does not negate Ms. Spencer's testimony, which I find reliable.

¹⁵ As of the hearing date, two employees on the unsatisfactory list were still employed by Respondent.

When I came to work some people came to me and ask me to go to union meeting and I was very nerv[ous] so I ask to go home employee Tara, Tracy and some other people.

5 Although the note only named two employees, Ms. Spencer informed Ms. Leonard that Shrona Williams had also accused Nereida Jimenez (Ms. Jimenez), Michelle Cozalles (Ms. Cozalles),¹⁶ and Nana Williams of threatening her. Ms. Leonard asked to speak to Shrona Williams, but Ms. Spencer said the employee was frightened and wanted to go home.

10 Ms. Leonard called in Tracy Davenport (Ms. Davenport), Ms. Jimenez, Ms. Cozalles, and Tara Smith.¹⁷ Without asking them for their versions of what had transpired among them and Shrona Williams or otherwise investigating the matter, Ms. Leonard told them they were suspended pending investigation for harassing a coworker.

15 By memorandum dated July 9, Ms. Leonard notified Ms. Chastek that 14 employees would be replaced by the end of the month. The memorandum included the names of Ms. Davenport, Ms. Jimenez, and Nana Williams, all of whom were still on suspension.

20 Nearly two weeks after the suspensions and following an interview by Ms. Leonard with Shrona Williams, Respondent determined the evidence was insufficient to show wrongdoing by the suspended employees. On July 20, Respondent reinstated Ms. Davenport, Nana Williams, Ms. Jimenez, and Tara Smith and paid them for the work they had missed because of the suspension.

25 C. Respondent's July 23 Termination of Gladys Matos

According to Ms. Leonard, one day in July, Respondent notified Gladys Matos (Ms. Matos) that she had been taken off the schedule. Later that day, Ms. Hernandez reported to Ms. Leonard that Ms. Matos had come to the facility and angrily confronted her in the facility's front lobby over the schedule change. Ms. Hernandez asked Ms. Leonard for approval to fire Ms. Matos, and Ms. Leonard directed Ms. Hernandez to terminate Ms. Matos.¹⁸ Ms. Leonard did not date the alleged confrontation between Ms. Matos and Ms. Hernandez,¹⁹ but her testimony indicated it occurred on a day when Ms. Matos was not scheduled to work. Ms. Leonard "subsequently" drafted a Notice of Employee Separation for Ms. Matos, on which
35 "insubordination" and "violation of company policies" were circled as reasons for separation. Ms. Leonard wrote on the notice, "Yelling @ administ. about assignment confrontational [with] mgmt—per Carmen." The separation notice is dated July 23, which is the date of Ms. Matos' discharge, but there is no evidence the separation notice was prepared on the same day as the alleged confrontation or ever shown to Ms. Matos. Ms. Hernandez did not testify.

40

45 ¹⁶ Ms. Cozalles is not named in the complaint; Counsel for the General Counsel states in his post-hearing brief that she did not cooperate in the investigation. Hereafter, I have omitted her name in describing and discussing the suspensions.

¹⁷ Nana Williams was unavailable.

¹⁸ Ms. Leonard's testimony is inconsistent on this point. She initially testified that Ms. Hernandez reported she had already terminated Ms. Matos, which action Ms. Leonard approved. She later testified that she directed Ms. Hernandez to terminate Ms. Matos.

50 ¹⁹ Respondent states in its post-hearing brief that the incident occurred on July 23 but does not explain the evidentiary basis for this assertion.

Ms. Matos testified that her name was removed from the work schedule on July 7 and 8, which deletions she was able to reverse after discussion with Ms. Spencer and Ms. Hernandez. On the following day, July 9, Ms. Matos' cousin reported to her that Ms. Matos' name had again been left off the schedule, but her cousin was able to resolve the omission. Ms. Matos denied
 5 having any scheduling problems thereafter and denied having any confrontation with Ms. Hernandez. Regarding her discharge, Ms. Matos testified that she worked her scheduled shift on July 23 and attended the employee meeting held that afternoon. At the end of the meeting, Ms. Matos picked up her paycheck, noticed a four-day pay shortage, which she discussed with Ms. Leonard, who verified the shortage with accounting personnel, and told
 10 Ms. Matos she would have a supplemental check to cover the missing four days by the end of the day.

According to Ms. Matos, at about 4 p.m. on July 23, Ms. Leonard called her to her office and gave her the supplemental check followed by a final paycheck, saying Respondent did not
 15 need her services any longer. Ms. Matos requested an exit interview. According to Ms. Matos, Ms. Leonard said something about Ms. Matos' warning and incident reports. Ms. Matos denied receiving any such discipline and accused Ms. Leonard of not looking at her file. Ms. Leonard agreed she had not done so but said Ms. Matos was not qualified to work at the facility, which Ms. Matos contradicted. Ms. Leonard asked Ms. Matos to gather her belongings and leave the
 20 facility.

Ms. Leonard and Ms. Matos' versions of Ms. Matos' July 23 discharge are irreconcilably dissimilar. In resolving the credibility of the two accounts, I have considered not only the manner and demeanor of the witnesses, but Respondent's failure to produce available
 25 corroborative or refutative evidence. I note that Ms. Leonard was unclear as to whether Ms. Hernandez had already fired Ms. Matos when she sought Ms. Leonard's approval or whether Ms. Leonard directed her to fire Ms. Matos. I also note that Ms. Leonard was vague as to when the alleged insubordination took place. While the date Ms. Leonard placed on Ms. Matos' separation notice suggests the claimed insubordination occurred on July 23, the day
 30 of discharge, Respondent has not otherwise provided evidentiary support for such a conclusion. Ms. Leonard testified to the effect that Ms. Matos was not scheduled to, and did not work on the date she was discharged. In contrary testimony, Ms. Matos' said that on her date of discharge, she worked, attended the employee meeting held that day, pointed out shortages in her paycheck, and received a supplemental check from Ms. Leonard. If Ms. Matos did not, in fact,
 35 work on July 23, then it is reasonable, indeed requisite, to disbelieve her account of her discharge. Conversely, if Ms. Matos did work that day, then Ms. Leonard's testimony cannot be accurate. Disproving Ms. Matos' testimony that she worked on July 23 should have been a simple matter for Respondent, given its access to attendance and payroll records, but Respondent adduced no evidence relevant to that issue. It is reasonable to draw an adverse
 40 credibility inference from its unexplained failure to do so. Ms. Matos, on the other hand, was clear and detailed as to working on July 23, her attendance at the employee meeting, her interaction with Ms. Leonard regarding inaccurate pay, her receipt of a supplemental check, and her discharge. I therefore credit Ms. Matos' testimony.

45 D. Respondent's July 23 Termination of Tracy Davenport, Nereida Jimenez, and Nana Williams

The Spencer list showed the following notations for the following three employees:

50	Tracy Davenport	--	Excessive absences 01
	Nereida Jimenez	--	refusal – Insub. 3/04

Nana Williams -- Visitor grievance re conduct
 2 family c/o roughness/attitude
 Resident c/o re verbal [illegible], insulting,
 manner toward Res.
 Eval poor supv./communic
 Suspended
 Rude to Surveyor—toss a book in front
 Of her
 Ret'd wk 1/1/03

Notwithstanding the work performance information on the Spencer list, Respondent hired Ms. Jimenez, Ms. Davenport, and Nana Williams on July 1. As detailed above, Respondent suspended them on July 7 and by memorandum dated July 9, scheduled them for discharge by the end of July. Respondent reinstated them from suspension on July 20. On July 23, without further explication, Ms. Leonard notified Ms. Jimenez, Ms. Davenport, and Nana Williams that Respondent no longer needed their services.

E. Respondent's August 10 Termination of Tara Smith

According to Ms. Leonard, prior to the weekend of August 7 and 8, she heard from employees that Tara Smith intended to avoid her scheduled work assignment that weekend by calling in sick. When Tara Smith called in sick as predicted, Ms. Leonard decided to terminate her because she believed she had falsely claimed illness to avoid working the weekend shifts. When Tara Smith returned to work on Monday, August 9, she presented a doctor's excuse stating that Tara Smith required medical leave of absence from August 7 to August 8. Ms. Leonard discounted the doctor's note, as she believed doctors' excuses to be readily accessible and frequently unreliable. However, before Ms. Leonard could terminate Tara Smith for absenteeism, a problem arose regarding Tara Smith's work station assignment on August 9.

According to Jeanne Mawak (Ms. Mawak), who supervised Tara Smith at the North Long Beach facility, Tara Smith was assigned on August 9 to work at Station 2, rather than Station 1A, her usual work area. Upon finding out that her work assignment had been changed, Tara Smith told Ms. Mawak she was going home. A short time thereafter, Ms. Mawak saw Tara Smith leaving the facility. According to Ms. Mawak, she told Tara Smith not to leave but to wait until the assistant director, Edna Mapoy (Ms. Mapoy) spoke to her, but Tara Smith exited the building. Ms. Mawak reported to Ms. Mapoy that Tara Smith was upset about her assignment and had left the building. Ms. Mapoy said Tara Smith commonly left work when unhappy about an assignment but would return. About 15-20 minutes later, Tara Smith returned, and Ms. Mawak told her she had changed her assignment back to Station 1A, where Tara Smith worked for the remainder of the day. At Ms. Leonard's request, Ms. Mawak gave a written statement of what had occurred, dated August 10, which reads, in pertinent part:

On Aug 9th, 2004 (approx 0655)...Tara Smith, LVN approached me. She said if I couldn't get her to work on 1A she would go home. I told Edna about it & advised me to tell Tara to speak with the Administrator when she arrives...I admit that I changed the rotation with Tara...Later on, Edna asked me why I did that & I told her that my intention was to keep the LVN's in their stations as they requested so Tara would stay.

Ms. Mapoy also submitted a written statement to Ms. Leonard, dated August 10, which reads, in pertinent part:

Tara Smith...wants to be assigned on station 1A only. Gets upset if assignment changed. Explained to her all charge nurses will have rotation with their assignment, so all nurses are familiar with all the residents. Have been very argumentative. Questions supervisor and will not go on assigned task, that she feels she does not want to do at that time. Regardless of anyone around, she will argue with the supervisor. Does not take the time to address the resident's concern regarding medication in a professional way.

Tara Smith's account of the incident is significantly different. According to Tara Smith, upon reporting for work, she and Elaine Moore (Ms. Moore) noticed their assignments had been changed, and Tara Smith asked Ms. Mapoy what was going on. Ms. Mapoy said Respondent wanted the nurses to rotate. Tara Smith denied being argumentative with Ms. Mapoy or telling Ms. Mawak she would leave if the assignment were not changed, saying she was fine with the new assignment. However, Tara Smith admitted she may have told Ms. Mapoy she was being harassed, and she admittedly told Ms. Leonard it was mighty strange and mighty funny that rotations were assigned on Tara Smith's scheduled shifts and asked whether the supervisor was also going to rotate. Tara Smith denied leaving the facility following the assignment discussion, saying she went to Station 2 where she was assigned and commenced working. In Tara Smith's recollection of the events, Ms. Mawak, *sua sponte*, changed the assignments, putting Tara Smith back to her regular assignment at Station 1A.

After considering all the testimony, I decline to give full credence to either Ms. Mawak's or Tara Smith's accounts of what occurred on August 9. Tara Smith minimized her confrontation with her supervisors over her changed assignment, claiming on one hand that she was fine with the change, but admitting on the other hand that she accused her supervisor of harassment. As to Ms. Mawak's account, although she testified that Tara Smith left the facility against Ms. Mawak's express directive, neither she nor Ms. Mapoy mentioned that in their written statements, and neither statement reflects any particular concern about Tara Smith's threat to go home. It is clear from her statement that Ms. Mawak voluntarily changed the assignments, albeit to keep peace. I find that Tara Smith engaged in argumentative behavior with her supervisors concerning her assignment but that she did not leave the facility or otherwise refuse to work.

On August 10, Judy Gonzalez, North Long Beach facility administrator, and Ms. Leonard met with Tara Smith. One of the two managers told Tara Smith that she was terminated for her weekend absence and for her response to the assignment change. Respondent's separation notice, dated August 10, noted the reasons for separation as insubordination and absenteeism.

A few weeks later, Respondent issued a warning notice, dated September 4 and signed by Ms. Mawak, to a non-Candlewood CNA, which stated, "argued [with] RN Supervisor about assignment; could not comprehend that there is no such thing as 'my run,' changed assignment on own...wasted time complaining about her assigned run for time that could've been spent on working in getting things done." There is no evidence the CNA was otherwise disciplined.

IV. Alleged Independent Violations of 8(a)(1)

On July 1, Respondent hosted a staff barbecue for North Long Beach facility employees on the facility's patio. During the festivities, Tyrone Freeman (Mr. Freeman), general president of the Union, and Mr. Hirst went to the patio and spoke to various employees. Ms. Leonard asked them to leave. According to Ms. Leonard, she told the two representatives that Windsor

had purchased the operations and the employees were now Windsor employees. Mr. Hirst testified that, in the presence of employees, Ms. Leonard said there was no union in the facility. According to Tara Smith, Ms. Leonard said that the facility was not a union building and the union was not welcome there. When the two men refused to leave, Ms. Leonard called the police and so informed the two men who left before the authorities arrived.

On July 23, Respondent held a staff meeting of about 40 employees. Ms. Leonard spoke at the meeting. According to Ms. Jimenez and Tara Smith, Ms. Leonard told the group of employees that the North Long Beach facility was not a union building and the employees were not union. Ms. Davenport also recalled that Ms. Leonard told the employees they could no longer converse in the building or after work but must clock out and go straight home.²⁰ Ms. Leonard explained that, like other Windsor facilities, the North Long Beach facility was union-free.

DISCUSSION

I. Alleged Violations of Section 8(a)(5)

A. Successorship Issue and Refusal to Bargain

The Supreme Court, in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), held that a new employer has a duty to recognize and bargain with an incumbent Union when two general factors, which can be summarized as (1) continuity of the enterprise and (2) continuity of the work force, are present. The *Burns* rationale applies to situations where the Union is the established bargaining agent. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Continuity of the work force requires that the former employees of the predecessor employer who were employed in the predecessor's bargaining unit(s) must comprise a majority of the new employer's complement within the same bargaining unit(s) at the point where the employer has achieved a "substantial and representative complement" of employees. *Fall River*, *supra* at 47.

Here, it is clear, and no party contends otherwise, that continuity of the enterprise exists. Although Respondent intended to upgrade the patient acuity level, and consequently the Medicare reimbursement rate, of the North Long Beach facility, the enterprise continued as a skilled nursing facility, subject to the same nursing protocols and regulatory requirements as before. The issue in contention is whether continuity of the work force existed. Respondent does not dispute that its initial work force was substantially the same as that employed by Candlewood, the predecessor employer. However, Respondent argues that it purchased the operations with the fully formed and justifiable intention of discharging all the predecessor's employees as soon as possible. While exigent circumstances forced Respondent to hire the predecessor's employees in order to keep the facility running, it hired them only as temporary workers who would be replaced as soon as practicable. Employment of temporary workers, Respondent insists, does not establish continuity of the work force; ergo, Respondent was not a successor to Candlewood on July 1 and therefore not obliged to recognize and bargain with the incumbent union representing Candlewood's employees at that time. Respondent further argues that determination of any bargaining obligation should be deferred until the point where

²⁰ Ms. Davenport was the only one of five employee witnesses to the meeting to recall the statement. Ms. Leonard denied hearing or making any such statement. Given the lack of corroborative testimony by witnesses who might be expected to remember such a statement if it were made, I decline to credit Ms. Davenport's testimony.

Respondent achieved a substantial and representative complement of “regular” employees, that is, after the completion of the former Candlewood employees’ 90-day temporary employment (October 1). As of October 1, Respondent points out, its relevant employee complement was composed of less than fifty percent of the former Candlewood employees, thereby negating any obligation to bargain with the Union at that time.

The General Counsel, on the other hand, contends that essentially the same work force existed after Respondent took over the North Long Beach facility as before and that Respondent’s claimed intention of replacing the Candlewood employees was spurious; therefore Respondent meets the Supreme Court’s tests for successorship.

The parties generated considerable evidence and argument regarding Respondent’s motivation in initially staffing the North Long Beach facility upon its takeover on July 1. In defending the temporary hiring of Candlewood employees, Respondent portrayed the North Long Beach facility as a dilapidated establishment where its predecessor warehoused elderly inhabitants in a neglectful, noisome, grimy muddle of Dickensian proportions. The General Counsel’s witnesses, on the other hand, described a hygienically snug establishment where cosseted residents toasted each other with nonalcoholic sparkling cider at monthly candlelight dinners. I suspect reality lies somewhere between the parties’ polarized views. It is not, however, incumbent upon me to determine the cleanliness and patient-care quality of the facility at the time Respondent decided to purchase the business. The issue here is not the objective accuracy of Respondent’s opinion, but the sincerity of it. In other words, was Respondent genuinely appalled at the condition of the Candlewood facility and its residents, or did Respondent feign revulsion in order to justify hiring former Candlewood employees on a temporary basis so as to avoid successorship obligations and/or to justify discharge of union adherents among its predecessor’s employees.²¹

No evidence was adduced to justify an inference that Respondent mendaciously maligned the Candlewood facility. Rather, the evidence suggests that, at least as of June, the Candlewood facility could indeed have used a little (hygienic) spit and polish. Moreover, after its takeover, Respondent expended nearly half a million dollars on repairs/improvements to the facility, which is potent evidence of the sincerity of Respondent’s opinion. Whether the facility’s need of a good spring cleaning justified Respondent’s rejection of the Candlewood staff as regular employees is another question, but here again, there is little evidence to gainsay Respondent’s assertion.²²

A more pertinent question, at least as it relates to the successorship issue, is whether the hiring of predecessor employees as something other than regular or permanent employees negates continuity of the work force. Respondent argues that because it classified the Candlewood employees as 90-day temporary employees and so notified them, any determination of continuity of the work force must be delayed until the expiration of the 90-day period, i.e. until October 1, by which time Respondent’s work force was no longer composed of

²¹ Evidence could, theoretically at least, demonstrate that the Candlewood facility was maintained in so pristine and exemplary a condition that any criticism of the facility must perforce stem from ulterior motives. Conversely, as the Charging Party attempted to show through its proffer of “Crisis of Care,” evidence could, again theoretically, prove Respondent’s patient-care standards to be so low as to brand its criticism of any other nursing home a transparent subterfuge. The evidence does not support either view.

²² The Complaint does not allege that Respondent discriminatorily hired the former Candlewood employees as temporary employees.

a majority of the Candlewood employees. Respondent cites *Houston Building Service, Inc.*, 296 NLRB 808 (1989) for the proposition that the Board will not consider “temporary” employees for the purpose of determining successorship. In *Houston*, the Board did not squarely address the question of whether temporary employees are employees for the purpose of determining successorship, as the Board therein determined the employees in question did not have temporary status. However, the case demonstrates the necessity of determining the actual status of the former Candlewood employees whom Respondent hired.

In arguing that Respondent hired the former Candlewood employees as temporary employees, Respondent distinguishes between temporary employees and probationary employees. In Respondent’s view the latter category consists of individuals who are regular employees, but who must wait a 90-day evaluation period before becoming permanent employees. Respondent’s employee handbook describes this “introductory period” as “an opportunity [for new employees] to demonstrate their ability to achieve a satisfactory level of performance...[which] the Company uses...to do an initial evaluation of employee capabilities, work habits and overall performance...” During the 90-day probationary period, the hiree may be dismissed if he/she does not meet Respondent’s expectations and standards. Temporary employees, at least according to Respondent’s employment handbooks are “hired on an interim basis to temporarily supplement the work force or to assist in the completion of a specific project.”

In the absence of evidence to the contrary, I accept that Respondent had nondiscriminatory and perhaps even justifiable reservations about the quality of work Respondent could expect from the Candlewood employees. I also accept that Respondent thought it expedient to have a period of time in which to assess and evaluate the Candlewood staff before recruiting them as regular or permanent employees and, accordingly, told Candlewood applicants they would be hired as temporary employees. A label does not, however, establish status, and no evidence was adduced herein to show that Respondent intended to hire the Candlewood employees “on an interim basis to temporarily supplement the work force or to assist in the completion of a specific project,”²³ after which the employment could be expected to end. On the contrary, in both employment interviews of and written employment offers to Candlewood applicants, Respondent gave them to understand that the 90-day temporary employment period was to permit assessment of employee skills and abilities and that “qualified” employees might be selected for regular employment. Although the temporary period of employment would end on September 30, as of their July 1 hiring date all of the former Candlewood employees worked regular hours on regular schedules, performed duties that were a regular part of Respondent’s operation, received regular wages and benefits, and were listed on Respondent’s payroll as employees. None had a definite or anticipated termination date, and all had a reasonable prospect of continuing employment based solely on Respondent’s assessment of their work performance. See *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 86 (1989), *Wayside Realty Group*, 281 NLRB 357 fn. 2 (1986); *J.P. Sand & Gravel Co.*, 222 NLRB 83, 84 fn. 2 (1976).

Respondent’s employee “introductory period” applied equally to former Candlewood employees and probationary employees.²⁴ Both groups enjoyed the same terms and conditions of employment, and both were excluded from discretionary benefit coverage until the expiration

²³ Respondent’s employee handbook.

²⁴ As stated in the handbooks given to both groups, the introductory period would “give new employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets their expectations.”

of a 90-day period. If selected for regular employment, former Candlewood employees did not then commence a probationary period; like probationary employees, they were eligible for all benefits upon completion of 90 days employment, regardless of which portion of the 90 days was designated as temporary. While Respondent may have more intensely scrutinized the Candlewood employees' work than it did that of non-Candlewood hires, in actuality the former Candlewood workers were in the same employment posture as Respondent's probationary employees: they could anticipate continued employment if their work satisfied Respondent. Thus, the former Candlewood employees hired by Respondent on July 1 are distinguishable from temporary employees (as defined by either the Board or Respondent) and are appropriately analogous to probationary employees. See *Hicks Oil*, supra at 87.

Establishment of a 90-day employee probationary period does not create doubt about the makeup of a work force sufficient to defer a work-force-continuity determination until after completion of the 90-day period. *Sahara Las Vegas Corp.*, 284 NLRB 337, FN 4 (1987) enf'd. *N.L.R.B. v. Sahara Las Vegas Corp.*, 886 F.2d 1320 (9th Cir. 1989). Therefore, the question of whether Respondent met the continuity of the work force requirement of *Burns* is answered by an examination of Respondent's work force as of its takeover of the North Long Beach facility on July 1. At that time, the BASE and LVN units of Respondent's work force were overwhelmingly composed of former Candlewood employees who had been represented by the Union. As both *Burns* factors, i.e. continuity of the enterprise and continuity of the work force, were present July 1, it follows that Respondent was a successor employer to Candlewood on that date. See *Siemens Building Technologies, Inc.*, 346 NLRB No. 9, FN1 (2005). As such, Respondent had a duty to recognize and bargain with the Union upon the Union's July 1 and July 6 requests that it do so. Respondent's refusal to recognize and bargain with the Union since July 1 constitutes an ongoing violation of Section 8(a)(5) and (1) of the Act.

B. Alleged Unilateral Changes

The General Counsel alleges that Respondent's post-takeover, unilateral elimination of the union bulletin board and prohibition of union-related postings constitutes unilateral changes unlawful under Section 8(a)(5) of the Act. The General Counsel also alleges that Respondent's implementation of a new employee handbook with terms and conditions of employment different from those effected by the predecessor employer is an unlawful unilateral change.

A successor employer is generally permitted to set new initial terms and conditions of employment without first bargaining with the employees' bargaining representative. See *SFX Target Center Arena Management, LLC*, 342 NLRB No. 71, FN 3 (2004). The *Burns* Court, however, recognized an exception to this principle where "it is perfectly clear that the new employer plans to retain all of the employees in the unit..." *Burns*, supra at 294-295. The Board has found the exception applies if either of the following circumstances exist: (1) the new employer has actively or, by tacit inference, misled employees into believing they would be retained without change in their wages, hours, or conditions of employment; or (2) the new employer has failed to announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. *Spruce Up Corporation*, 209 NLRB 194, 195 (1974). Here, Respondent informed employees they would be hired as temporary employees, describing a 90-day probationary period. As the Board noted in *Spruce Up*:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court.²⁵

When the possibility that the predecessor's employees may not enter into an employment relationship with the new employer is a real one, the Board does not consider it "perfectly clear" that the new employer "plans to retain all of the employees in the unit." *Ibid.* Here, Respondent informed the Candlewood applicants that they would be employed only in a temporary or probationary status for 90 days. That should have signaled to the applicants that terms and conditions of employment with Respondent were not going to be identical with those of its predecessor, and they could have declined employment upon learning they would have to complete a probationary period. Thus, although Respondent's obligation to recognize and bargain with the Union attached when, on July 1, Respondent had hired a "substantial and representative" complement within the units, Respondent did not violate the Act by setting initial terms of employment. Contrast *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003) (Employer a "perfectly clear" successor when it informed employees it would provide them employment, recognize their seniority, and grant equivalent salaries and benefits.)²⁶

Regarding the alleged unilateral elimination of the union bulletin board and prohibition of union-related postings, it is clear that bulletin board matters are mandatory subjects of bargaining. *ATC/Vancom of California, L.P.* 338 NLRB 1166 (2003); *RCN Corporation*, 333 NLRB 295 (2001); *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991). Concerning bulletin board postings, the Board has stated:

The legal principles applicable to cases involving access to company-maintained bulletin boards are simply stated and well established. In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items..., it may not "validly discriminate against notices of union meetings which employees also posted." Moreover, in cases such as these, an employer's motivation, no matter how well meant, is irrelevant. [footnotes omitted.]²⁷

²⁵ *Spruce Up Corporation*, supra, at 196.

²⁶ Citing *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000), the Charging Party argues that Respondent forfeited its right to set initial terms by informing employees there would be no union at the facility. The instant facts are distinguishable. In *Stretchforming*, the employer told its predecessor's employees prior to interviewing and hiring them that there would be no union at its facility. The Board considered such to be imposition of an unlawful condition, which vitiated the employer's right to determine other legitimate initial terms. See *Advanced Stretchforming Int'l, Inc.*, 323 NLRB 529 (1997). Here Respondent set no unlawful pre-employment conditions.

²⁷ *Honeywell, Inc.*, 262 NLRB 1402 (1982), enf'd. 722 F.2d 405 (8th Cir. 1983); see also *Johnson Technology, Inc.*, 345 NLRB No. 47 (2005).

Consistent with Respondent's above-enunciated right to set initial terms and conditions of employment for the Base and LVN unit employees it hired on July 1, Respondent had no obligation to provide a bulletin board for union postings; its only obligation in that regard was to bargain over the institution of a union bulletin board along with all other terms and conditions of employment of the Base and LVN unit employees.²⁸

As described earlier, Respondent has violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union regarding its employees in the BASE and LVN units, which encompasses the obligation to bargain over all terms and conditions of such employees' employment, including provision for union bulletin boards. However, Respondent did not violate the Act by setting initial terms of employment for the Candlewood unit employees; I shall, therefore, dismiss the complaint allegations of unlawful unilateral changes.

II. Alleged Violations of Section 8(a)(3)

A. Respondent's Refusal to Hire Edna Colter, Debra Smith, Sharie Hailey, and Annie Moss

The complaint alleges that Respondent violated Section 8(a)(3) and (1) by failing and refusing to hire Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss on July 1 because of their positions as union stewards during their employment with Respondent's predecessor. In alleged refusal-to-hire cases, the General Counsel bears the burden under *FES*²⁹ of showing the following: Respondent was hiring at the time the alleged discriminatees applied for employment, the alleged discriminatees had experience and training relevant to the requirements of the available employment positions, and antiunion animus contributed to Respondent's decision not to hire them.

It is clear Respondent was hiring during the relevant time period. It is also clear that Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss had experience and training relevant to the available positions. Accordingly, the General Counsel has met its burden as to the first two elements of *FES*. As to the third element, "the allegations of unlawful discrimination...must be supported by affirmative proof establishing by a preponderance of the evidence that the Respondent's conduct was unlawfully motivated." *Ken Maddox Heating & Air Conditioning, Inc.*, 340 NLRB No. 7, slip op. 3 (2003).

Unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corporation of America*, 337 NLRB 99 (2001). Unlawful motive may, for example, be inferred from such circumstantial evidence as animus and disparate treatment. *Overnite Transportation*, 335 NLRB 372, 375 (2001). The General Counsel adduced evidence of Respondent's animus toward unionization of its employees: (1) Respondent waged an antiunion campaign; (2) Respondent told employees the North Long Beach facility was nonunion; (3) Respondent directed its supervisors to keep its managers informed of employee interest in the Union and to discourage union support; (4) Respondent unlawfully refused to recognize the Union as its employees' bargaining

²⁸ Irrespective of its obligation to bargain with the Union, Respondent could not discriminate against employee use of company bulletin boards for union postings if Respondent otherwise permitted personal postings. The General Counsel did not plead such discrimination in the complaint, and contrary to Counsel for the General Counsel's post-hearing argument, the matter was not fully litigated. Accordingly, I decline to address this issue.

²⁹ 331 NLRB 9 (2000), aff'd 301 F.3d 83 (3rd Cir. 2002).

representative. Considering Respondent's demonstrated animus, I find the General Counsel has met his initial burden of showing that the refusal to hire Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss on July 1 was unlawfully motivated. Since the General Counsel has met his initial burden for the refusal-to-hire allegations, the burden shifts to Respondent to show it would not have hired the four individuals even in the absence of their union activities or affiliation while employed by Respondent's predecessor. *FES*, supra, at 12; *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent maintains that Candlewood employees' past work performance was the sole measure by which Respondent gauged Candlewood applicants. Respondent investigated the work records of the Candlewood employees by consulting with Candlewood's administrator, Ms. Hernandez, as well as conducting its own review of Candlewood personnel files, resulting in a compilation of problem-employee names (the Hernandez and Spencer lists). Respondent points out that it declined to hire to nearly half the Candlewood employees whose names appeared on the Hernandez and Spencer lists, not just the four named in the complaint, and in each instance made a nondiscriminatory determination that the documented misconduct rendered the applicant unfit for employment. According to Respondent, the Candlewood personnel files of Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss showed significant performance blemishes. The files recorded Ms. Colter as being insubordinate in both 2003 and 2004, Debra Smith as having poor attendance and an error in administering medication, Ms. Hailey as being insubordinate and confrontational and having poor attendance, and Ms. Moss as creating a hostile work environment for other employees.

The General Counsel argues that the past misconduct of Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss was no more significant than that of other listed employees whom Respondent hired, which in itself demonstrates discriminatory motivation. While the misconduct distinctions among the four former union stewards and the listed employees who were hired may be subtle, I cannot, from that alone, reject Respondent's explanation of why it hired certain employees over others. As the Board has pointed out, "In passing the Act, Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient. The Board has no authority to sit in judgment on managerial decisions." *Neptco, inc.*, 346 NLRB No. 6, FN 16 (2005), quoting *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444-445 (5th Cir. 1978). I cannot, therefore, simply discount Respondent's managerial opinion that the past derelictions of Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss rendered them more unfit for employment than other employees; I can only determine whether probative evidence shows Respondent's opinion to be disingenuous, which I have not found.

Respondent's animus coupled with Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss' status as union stewards may create suspicion as to the legitimacy of Respondent's reason for including them in its rejected Candlewood employee pool. However, mere suspicion that union activity was a basis for Respondent's refusal to hire is insufficient to reject Respondent's otherwise cogent defense of its hiring decisions. See *Neptco, inc.*, supra, slip op. 2 (2005). Accordingly, I find that Respondent has met its shifted burden of demonstrating that it would not have hired Ms. Colter, Debra Smith, Ms. Hailey, and Ms. Moss even in the absence of their past union activities and adherence, and I will dismiss the complaint allegations relating to them.

B. Respondent's July 7 Suspensions of Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith

On July 7, Ms. Davenport, Nana Williams, Ms. Jimenez, and Tara Smith invited

coworker Shronda Williams to a union meeting, after which Shronda Williams accused them of harassment and intimidation. Respondent argues that its subsequent suspension of Ms. Davenport, Nana Williams, Ms. Jimenez, and Tara Smith was a reasonable response to the serious coworker accusation leveled against them and that it was entitled to treat the four employees “as it would any other employees accused of harassing coworkers, notwithstanding that the alleged harassment also involved union activity.” Respondent contends the General Counsel has failed to establish that the suspensions were imposed because of the union activities of the suspended employees.

There is neither dispute nor question that inviting another employee to a union meeting is activity protected by the Act. The four suspended employees’ conduct in inviting Shronda Williams to a union meeting is protected. There is no question Respondent knew the nature of the employees’ conduct before it suspended them, and Respondent’s post-suspension investigation admittedly revealed no misconduct to negate the Act’s protection. Nevertheless, Respondent argues it did not violate Section 8(a)(3) of the Act, as it was not motivated by antiunion animus in suspending the employees. Rather, Respondent asserts, it believed in good faith, albeit mistakenly, that the suspended employees had engaged in misconduct.

As Respondent points out, the question of whether Respondent violated Section 8(a)(3) in terminating Ms. Davenport, Nana Williams, and Ms. Jimenez rests on its motivation.³⁰ The Board has established an analytical framework for deciding cases turning on employer motivation in *Wright Line*, supra. To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee’s protected conduct was a motivating factor in the employer’s decision. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a “substantial or motivating factor in the employer’s decision.” *Budrovich Contracting Co.*, 331 NLRB 1333 (2000). Put another way, “the General Counsel must establish that the employees’ protected conduct was, *in fact*, a motivating factor in the [employer’s] decision.” *Webco Industries*, 334 NLRB 608, fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, these elements are clearly met: in approximately the same time period as the suspensions, Respondent demonstrated animus toward employees’ union sympathies and protected activities, as stated earlier, by stressing that the North Long Beach facility was nonunion, by directing its supervisors to watch for and discourage employee interest in the Union, and by unlawfully refusing to recognize and bargain with the Union. Moreover, in suspending the four employees, Respondent failed to ask any of them for their versions of what occurred with Shronda Williams. Rather, Respondent relied solely on Shronda Williams’ reported panic at being invited to a union meeting, although her written report reveals neither word nor deed that might account for her extreme alarm: “When I came to work some people came to me and ask me to go to union meeting and I was very nerv[ous] so I ask to go home.”

³⁰ An employer’s reasonable belief of misconduct may justify adverse employment action. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).

These circumstances support an inference that the protected activities of Ms. Davenport, Nana Williams, and Ms. Jimenez were motivating factors in Respondent's decision to suspend them. *Wright Line*, supra at 1089. Accordingly, I find the General Counsel has met his initial burden. Such a finding does not mean that the discharges were in fact "*unlawfully motivated*."

5 *Id.* As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus...may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.*, 340 NLRB No. 132, at slip op. 2, fn. 4 (2003); see also *American Gardens Management Company*, 338 NLRB 644, 645 (2002). The General Counsel's establishment of

10 the *Wright Line* factors does, however, shift the burden to Respondent to demonstrate that it would have discharged Ms. Davenport, Nana Williams, and Ms. Jimenez even in the absence of their protected activities.

Respondent has not met its burden. Not only did Respondent fail to explain how

15 Shrona Williams' vague and mild account of being invited to a union meeting could reasonably have prompted immediate suspension of five employees, it also failed to explain why Ms. Leonard neglected to ask any of the suspended employees their version of what had occurred before summarily suspending them.³¹ Respondent's vigorous opposition to unionization, its unlawful refusal to bargain with the Union, and its

20 inexplicable willingness to forego even minimal investigation while hastily suspending employees for promoting a union meeting reasonably lead to a conclusion that the suspensions were discriminatorily motivated. See *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB No. 107, at slip op.3 (2004); *Hewlett Packard Company*, 341 NLRB No. 62, fn. 2 (failure to conduct investigation evidence of discriminatory intent.) I find, therefore,

25 that Respondent violated Section 8(a)(3) of the Act by suspending Ms. Davenport, Nana Williams, Ms. Jimenez, and Tara Smith on July 7.³²

C. Respondent's July 23 Terminations of Tracy Davenport, Nana Williams, and Nereida Jimenez

30 Ms. Davenport, Nana Williams, and Ms. Jimenez had been back to work from unlawful suspension for only a few days when Respondent fired them. The question of whether Respondent violated the Act in terminating Ms. Davenport, Nana Williams, and Ms. Jimenez rests on its motivation. As to their terminations, the General Counsel has clearly proven *Wright*

35 *Line's* requisite elements of union activity, employer knowledge, and employer animus toward union representation of its employees: Ms. Davenport, Nana Williams, and Ms. Jimenez were union proponents and Respondent's managers knew them to be so, as Ms. Leonard had suspended them when they engaged in union activity only 16 days earlier. Respondent demonstrated animus toward employees' union sympathies and protected activities, as

40 discussed earlier, by stressing that the North Long Beach facility was nonunion, by directing its supervisors to watch for and discourage employee interest in the Union, by unlawfully refusing to recognize and bargain with the Union, and by discriminatorily suspending Ms. Jimenez,

³¹ I have not overlooked Ms. Spencer's description of Shrona Williams' abject terror, but a comparison of that description with the tame content of her written account would surely suggest to a sensible administrator, which I have no doubt Ms. Leonard is, that a little more inquiry, such as asking the involved employees what happened, might be prudent.

³² In light of my finding that Ms. Leonard did not have a good faith belief that the five employees had engaged in misconduct when she suspended them, *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) does not apply. See *Integrated Electrical Services, Inc., d/b/a Primo Electric*, 345 NLRB No. 99 (2005).

Ms. Davenport, and Nana Williams on July 7. Accordingly, I find the General Counsel has met his initial burden by “making a showing sufficient to support the inference” that the protected activities of Ms. Davenport, Nana Williams, and Ms. Jimenez were motivating factors in Respondent’s decision to discharge them. *Wright Line*, supra at 1089. The General Counsel’s establishment of the *Wright Line* factors shifts the burden to Respondent to demonstrate that it would have discharged Ms. Davenport, Nana Williams, and Ms. Jimenez even in the absence of their protected activities.

Respondent contends that the termination of these three employees was merely part and parcel of Respondent’s legitimate and established plan to replace all Candlewood employees who had not proven themselves worthy of Windsor employment. Respondent points out that on July 9, Ms. Leonard named 14 employees whose employment Respondent intended to terminate by the end of July. According to Respondent, the names of Ms. Davenport, Nana Williams, and Ms. Jimenez, who were at that time in unlawful suspension, were included among the 14 to be discharged because their names had appeared on the Spencer list (although not on the Hernandez list.) The Spencer list noted the derelictions of the three as follows:

Ms. Davenport	--	excessive absences [in 2001]
Ms. Jimenez	--	refusal Insub[ordination] 3/04
Nana Williams	--	Visitor grievance re conduct
		Family c/o roughness/attitude
		Resident c/o ...manner toward Res[ident]
		Eval poor supv./communic
		Suspended
		Rude to [state inspector]
		Ret’d wk 1/1/03

Respondent obviously did not think the above-recorded misconduct rendered the three unfit for initial employment, and it cannot be that Respondent intended to fire all employees whose names appeared on the Hernandez or Spencer lists since Respondent retained other listed employees. Presumably, when hired, Ms. Davenport, Ms. Jimenez, and Nana Williams joined the cadre of former Candlewood employees whose work Respondent would assess in determining whether to offer them regular employment, and there is no evidence Ms. Davenport, Ms. Jimenez, or Nana Williams were unsatisfactory employees during their approximately three weeks of employment. Since Respondent bears the burden of showing that it would have discharged Ms. Davenport, Nana Williams, and Ms. Jimenez regardless of their union activities, Respondent must explain why they were selected for termination over other employees similarly situated. Respondent has not done so. In view of its demonstrated animus, Respondent’s failure to state any basis for the discharge of Ms. Davenport, Ms. Jimenez, or Nana Williams beyond its general desire to replace most former Candlewood employees compels the conclusion that their discharges were invidiously motivated.³³ Respondent has not, therefore, met its shifted burden of demonstrating that it would have

³³ While wanting to replace former Candlewood employees may have been a legitimate reason for discharging some or even most such employees, an employer “cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *Yellow Enterprise Systems*, 342 NLRB No. 77, slip op. 1, citation omitted.

discharged Ms. Davenport, Nana Williams, and Ms. Jimenez even in the absence of their protected activities.³⁴ Accordingly, I find Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Ms. Davenport, Nana Williams, and Ms. Jimenez on July 23.

5 D. Respondent's July 23 Termination of Gladys Matos

Respondent discharged Ms. Matos on July 23. As noted above, Respondent contends that its discharge of Ms. Matos was a nondiscriminatory consequence of Ms. Hernandez' report of insubordination, while the General Counsel argues that Respondent's animosity toward
10 Ms. Matos' union activities, presumed from her former position as a Candlewood union shop steward, motivated her discharge. As set forth above, I have resolved the respective credibility of Ms. Leonard and Ms. Matos regarding the circumstances of Ms. Matos' discharge in favor of Ms. Matos.

15 With regard to the discharge of Ms. Matos, the General Counsel has clearly proven *Wright Line's* requisite elements of union activity, employer knowledge, and employer animus toward union representation of its employees.³⁵ Given the extent of Respondent's animosity toward unionization of its employees, which, as a former union steward Ms. Matos would be
20 expected to promote, the General Counsel has adduced sufficient evidence to support an inference that Ms. Matos' pre-takeover protected conduct was a "substantial or motivating factor in the employer's decision" to terminate her. See *Budrovich Contracting Co.*, supra. Even more compellingly, the General Counsel has also shown that Respondent presented a false account of Ms. Matos' discharge. False explanations for an employer's actions support an
25 inference that the true motive is an unlawful one. *Southside Hospital*, 344 NLRB No. 79 (2005); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Accordingly, I find the General Counsel has met his initial *Wright Line* burden in this instance. The burden of persuasion thus shifts to Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. Having rejected as false Respondent's only
30 explanation for the discharge of Ms. Matos, it follows that Respondent has not met its burden. Accordingly, I find that Respondent discharged Ms. Matos in violation of Section 8(a)(3) of the Act.

E. Respondent's August 10 Termination of Tara Smith

35 Under *Wright Line*, the General Counsel must prove the requisite elements of union activity, employer knowledge, and employer animus. As discussed above, the General Counsel has proven Respondent's knowledge of Tara Smith's union activity; Respondent knew Tara Smith was one of five employees who invited another employee to a union meeting on July 7. Further, Respondent's reaction to those employees' protected union activities evidences animus
40 toward their union partisanship. Specifically, I have found that Respondent discriminatorily suspended Tara Smith because of her union activity. Given Respondent's contemporaneous, unlawful conduct toward Tara Smith, the General Counsel has also adduced evidence sufficient to support an inference that her union activity was a "substantial or motivating factor in the

45 ³⁴ The fact that Respondent did not also fire Tara Smith does not alter this conclusion. Evidence suggests that Ms. Hernandez may have intervened to save Tara Smith's job, as Ms. Hernandez told Tara Smith on July 26, that she had "put her butt on the line for [Tara Smith's] job." Regardless, an employer's failure to retaliate against all union activists does not disprove a discriminatory motive. *Volair Contractors*, 341 NLRB No. 98, fn. 17 (2004).

50 ³⁵ It is unnecessary to repeat the evidence establishing the *Wright Line* criteria, which has been earlier detailed.

employer's decision" to terminate her. See *Budrovich Contracting Co.*, supra. Accordingly, I find the General Counsel has met his initial *Wright Line* burden in Tara Smith's discharge. The burden of persuasion thus shifts to Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

Respondent maintains that it would have discharged Tara Smith regardless of her union activity because of her questionable weekend absence and her insubordination. The General Counsel contends that Respondent's absenteeism and insubordination defenses are pretexts for ridding itself of a union supporter.

Tara Smith was absent from work on the weekend of August 7 and 8, and there is no dispute that Ms. Leonard accused her of falsely calling in sick. Further, on August 9, Tara Smith argued with her supervisors about her work assignment. Either or both of those circumstances could form a lawful basis for discharge, and the Board does not substitute its business judgment for that of an employer in deciding what employee conduct justifies discipline.³⁶ However, it is not enough for Respondent to show conduct occurred that might justify a discharge; the Board must analyze relevant evidence to determine whether the conduct, rather than unlawful considerations, actually motivated the discharge. See *Midnight Rose Hotel & Casino*, supra, at slip op. 3.

Respondent asserts that unnamed employees informed Ms. Leonard that Tara Smith intended to claim a spurious illness to avoid work the weekend of August 7 and 8. According to Respondent, that alone provoked Ms. Leonard's decision to discharge Tara Smith, a decision Respondent made without ever mentioning the accusations to Tara Smith, much less investigating them. Tara Smith submitted a doctor's excuse for her absence, which Respondent rejected out of hand without any further inquiry. Respondent produced no corroborative evidence that Tara Smith deceptively claimed illness to cover for a volitional absence, and Ms. Leonard's failure even to broach the matter with Tara Smith before deciding on discharge supports an inference that something other than good faith prompted the leap to judgment.

Respondent also claimed that Ms. Leonard terminated Tara Smith for her conduct on August 9: refusing to work if she did not get the desired assignment, leaving the building, and being insubordinate to a supervisor, the last being the most damning point. It is true that Tara Smith protested her changed assignment, accused her supervisor of harassment, and threatened to leave work. It is equally true that such conduct could form a legitimate basis for discharge. It is not, however, clear that Respondent would normally discharge an employee in similar circumstances. Indeed, the evidence is to the contrary. On September 4, less than a month after Tara Smith argued with her supervisor over her assignment, Ms. Mawak issued a warning notice to a non-Candlewood CNA for the following conduct: "argued [with] RN Supervisor about assignment; could not comprehend that there is no such thing as 'my run,' changed assignment on own...wasted time complaining about her assigned run for time that could've been spent on working in getting things done." The CNA's reported conduct is not appreciably different than that resulting in Tara Smith's discharge. In the absence of a cogent explanation for the disparate discipline accorded the two employees, I am forced to conclude

³⁶ Counsel for the General Counsel argues, essentially, that Respondent's assignment change was not in the best interests of its patients, but Respondent's wisdom in making work assignments is not relevant.

that Respondent has not met its burden of demonstrating that it would have discharged Tara Smith even in the absence of her protected union activity. Accordingly, I find Respondent violated Section 8(a)(3) and (1) of the Act by discharging Tara Smith on August 10.³⁷

5 III. Alleged Independent Violations of 8(a)(1)

The complaint alleges that Respondent committed the following independent violations of 8(a)(1) by the following conduct:

- 10 1. On July 1, telling union representatives in the presence of employees that there was no union at the North Long Beach facility and that the facility was not a union facility.
2. On July 23, telling employees at a staff meeting that the North Long Beach facility was not a union facility and that the employees were not union employees.
- 15 3. About July 23, announcing and promulgating a rule requiring all employees to leave Respondent's premises at the end of their shifts and not remain in the parking lot to talk to each other.

On the July 1 and July 23 occasions that Respondent's representatives told employees, or others in employees' hearing, that the North Long Beach facility was not a union facility, Respondent was legally obligated to recognize and bargain with the Union regarding the Base and LVN unit employees. Respondent's continuing refusal to recognize and bargain with the union was an unfair labor practice, and its continued assertion that it had no such obligation or that the facility was "not a union facility," was of a nature tending to disparage and cause disaffection from the Union. See *The Westgate Corp.*, 196 NLRB 306, 313 (1972) (when an employer delays bargaining, "unrest and suspicion are generated...and the status of the bargaining representative is disparaged"). Respondent's conduct negated the Union's representative role and could reasonably be expected to undercut the Union's standing among employees, particularly where employees were in the vulnerable probationary period of employment and might reasonably believe that union support would jeopardize permanent employment. See *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001). Accordingly, I find that by communicating to employees that the North Long Beach facility was not a union facility, Respondent violated Section 8(a)(1) of the Act.

As to the allegation that Respondent unlawfully announced and promulgated a rule requiring all employees promptly to quit Respondent's premises after work, no credible evidence supports the allegation. Accordingly, I shall dismiss this allegation of the complaint.

Conclusions of Law

- 40 1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

³⁷ In light of this finding, it is unnecessary to address Counsel for the General Counsel's alternative theory that Respondent violated 8(a)(1) of the Act by the discharge, as Tara Smith was engaged in protected concerted activity by expressing concern over her changed assignment. I note, however, that while the Board has found concerted conduct when an individual employee seeks to initiate group action or brings a group complaint to management attention, *Phillips Petroleum Co.*, 339 NLRB 916, 918 and fns. 11 and 12 (2003), there is no evidence that Tara Smith acted in other than her own self-interest. See *K-Mart Corporation*, 341 NLRB No. 102, slip op. 2 (protest unauthorized by other employees and not intended to initiate group action not concerted).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent is, and has been since July 1, 2004, a successor to Covenant Care Orange, Inc., d/b/a Candlewood Care Center.
4. The following units of Respondent's employees are appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

The Base Unit

All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed at the nursing facility.

The LVN Unit

All full-time and regular part-time Licensed Vocational Nurses (LVNs) employed at the nursing facility.

5. The Union has been at all times since July 1, 2004, and is, the exclusive bargaining representative of the employees in said units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
6. Since July 1, 2004, Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning the terms and conditions of employment of employees in the above-described appropriate units.
7. Respondent violated Section 8(a)(3) and (1) of the Act on July 7 by suspending employees Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith.
8. Respondent violated Section 8(a)(3) and (1) of the Act on July 23 by terminating employees Tracy Davenport, Nana Williams, Nereida Jimenez, and Gladys Matos.
9. Respondent violated Section 8(a)(3) and (1) of the Act on August 10 by terminating employee Tara Smith.
10. Respondent violated Section 8(a)(1) of the Act by informing employees there was no union at its facility or that its facility was not a union facility.
11. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily suspended employees Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith on July 7, 2004, and having discriminatorily discharged employees Tracy Davenport, Nana Williams, Nereida Jimenez, and Gladys Matos on July 23, 2004, and employee Tara Smith on August 10, 2004, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension and/or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective bargaining representative of the above-described units.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

ORDER

Respondent, S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Failing and refusing to bargain in good faith with Service Employees International Union, Local 434B, AFL-CIO, as the collective bargaining representative of its employees in the Base and LVN units.
- (b) Suspending or discharging any employee for engaging in union or other concerted protected activities.
- (c) Informing employees that its North Long Beach facility is not a union facility.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) On request, bargain with Service Employees International Union, Local 434B, AFL-CIO as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement(s):

The Base Unit

All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed at the nursing facility.

The LVN Unit

All full-time and regular part-time Licensed Vocational Nurses (LVNs) employed at the nursing facility.

- (b) Within 14 days from the date of this Order, insofar as it has not already done so, offer full reinstatement to Tracy Davenport, Nana Williams, Nereida Jimenez, Gladys Matos, and Tara Smith to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (c) Make Tracy Davenport, Nana Williams, Nereida Jimenez, Gladys Matos, and Tara Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.³⁹
- (d) Expunge from its files any reference to the unlawful suspensions of Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith and thereafter notify them in writing that this has been done and that the suspensions will not be used against them in any way.
- (e) Expunge from its files any reference to the unlawful discharges of Tracy Davenport, Nana Williams, Nereida Jimenez, Gladys Matos, and Tara Smith and thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its facility in Long Beach, California copies of the attached notice marked “Appendix.”⁴⁰ Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 1, 2004.
- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

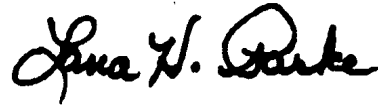
³⁹ The question of whether Respondent's reimbursement of Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith following their suspensions makes them whole for the unlawful suspensions is left to the compliance stage of these proceedings.

⁴⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: January 31, 2006

5

A handwritten signature in black ink, appearing to read "Lana H. Parke". The signature is fluid and cursive, with the first name "Lana" being more prominent.

Lana H. Parke
Administrative Law Judge

10

15

20

25

30

35

40

45

50

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT refuse to bargain in good faith with Service Employees International Union, Local 434B, AFL-CIO (the Union) over the terms and conditions of employment of employees in the following units:

The Base Unit

All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed at the nursing facility.

The LVN Unit

All full-time and regular part-time Licensed Vocational Nurses (LVNs) employed at the nursing facility.

WE WILL NOT suspend or discharge any of you for supporting the Union or any other labor organization.

WE WILL NOT inform any of you that there is no union at our North Long Beach facility.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described bargaining units.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer Tracy Davenport, Nana Williams, Nereida Jimenez, Gladys Matos, and Tara Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, insofar as we have not already done so, make Tracy Davenport, Nana Williams, Nereida Jimenez, Gladys Matos, and Tara Smith whole for any loss of earnings and other benefits resulting from their suspensions and/or discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and/or discharges of Tracy Davenport, Nana Williams, Nereida Jimenez, Gladys Matos, and Tara Smith, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the suspensions and/or discharges will not be used against them in any way.

S&F Market Street Healthcare LLC d/b/a Windsor
Convalescent Center of North Long Beach

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

888 South Figueroa Street, 9th Floor

Los Angeles, California 90017-5449

Hours: 8:30 a.m. to 5 p.m.

213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

S&F MARKET STREET HEALTHCARE LLC
d/b/a WINDSOR CONVALESCENT CENTER
OF NORTH LONG BEACH

and

Case 21-CA-36422

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 434B, AFL-CIO

and

Case 21-CA-36645

ANNIE MOSS, An Individual

and

Case 21-CA-36650

TARA SMITH, An Individual

TABLE OF CONTENTS

DECISION	1
Statement of the Case	1
Issues	2
Findings of Fact	2
I. Jurisdiction	2
II. Alleged Violations of 8(a)(5)	3
A. Successorship Issue and Refusal to Bargain	3
B. Respondent's Position Regarding Union Representation of Its Employees	8
III. Alleged Violations of 8(a)(3)	9
A. Respondent's Refusal to Hire Edna Colter, Debra Smith, Sharie Hailey, and Annie Moss	9
B. Respondent's July 7 Suspensions of Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith	10
C. Respondent's July 23 Termination of Gladys Matos	11
D. Respondent's July 23 Termination of Tracy Davenport, Nereida Jimenez, and Nana Williams	12
E. Respondent's August 10 Termination of Tara Smith	13
IV. Alleged Independent Violations of 8(a)(1)	14
DISCUSSION	15
I. Alleged Violations of Section 8(a)(5)	15
A. Successorship Issue and Refusal to Bargain	15
B. Alleged Unilateral Changes	18
II. Alleged Violations of Section 8(a)(3)	20
A. Respondent's Refusal to Hire Edna Colter, Debra Smith, Sharie Hailey, and Annie Moss	20
B. Respondent's July 7 Suspensions of Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith	21
C. Respondent's July 23 Terminations of Tracy Davenport, Nana Williams, and Nereida Jimenez	23
D. Respondent's July 23 Termination of Gladys Matos	25
E. Respondent's August 10 Termination of Tara Smith	25
III. Alleged Independent Violations of 8(a)(1)	27
Conclusions of Law	27
Remedy	28
ORDER	29
APPENDIX	32